

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Eileen Finegan,) No. CV 07-693-TUC-FRZ
Plaintiff,) **ORDER**
vs.)
AUTOTRANSPORTES TUFESA S.A. de)
C.V., a foreign corporation; TUFESA)
U.S.A., L.L.C., an Arizona Corporation,,)
Defendants.)

)

Pending before the Court is Defendant Tufesa U.S.A. L.L.C.'s ("Tufesa USA") motion for summary judgment and Autotranportes Tufesa S.A de C.V.'s ("Autotransportes Tufesa") motion to dismiss for lack of personal jurisdiction. For the reasons stated below, both motions are denied.

STANDARD OF REVIEW: SUMMARY JUDGMENT

Summary judgment is appropriate where "there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). A genuine issue exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is "material" if, under the applicable substantive law, it is "essential to the proper disposition of the claim." *Id.* An issue of fact is "genuine" if "there is sufficient evidence on each side so that a rational trier of fact could resolve the issue either

way." *Id.* Thus, the "mere scintilla of evidence" in support of the nonmoving party's claim is insufficient to defeat summary judgment. *Id.* at 252. However, in evaluating a motion for summary judgment, "the evidence of the nonmoving party is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255 (emphasis added). Further, a court "[must] not weigh the evidence[, make credibility determinations,] or determine the truth of the matter" at the summary judgment stage, but may only determine whether there is a genuine issue for trial. *Abdul-Jabbar v. General Motors Corp.*, 85 F.3d 407, 410 (9th Cir.1996); *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1054 (9th Cir. 1999); *see also Self-Realization Fellowship Church v. Ananda Church of Self-Realization*, 206 F.3d 1322, 1328 (9th Cir. 2000) (recognizing that on a motion for summary judgment, "a district court is entitled neither to assess the weight of the conflicting evidence nor to make credibility determinations")

BACKGROUND

On July 9, 2007, Plaintiff Eileen Finegan purchased a bus ticket from Autotransportes Tufesa in Guadalajara, Mexico for non-stop, direct¹ bus transportation to her home in Tucson, Arizona. Ms. Finegan was never advised that a different bus company would provide a portion of her bus travel, or that a different bus driver from a wholly separate bus company would take control of the bus at the border to complete the trip during the U.S. portion of the bus trip. On July 10, 2007, while driving in Mexico en route to Tucson, the Autotransportes Tufesa bus transporting Plaintiff along with other passengers plunged off a highway near Benjamin Hill in Sonora, Mexico resulting in the deaths of several passengers and injuries to many other passengers. Subsequent to the accident, the driver of the bus, C. Faustino Portugal Garcia, was fired. Plaintiff was injured in the accident and brought suit against Autotransportes Tufesa and Tufesa USA based on the injuries she sustained in the

¹Direct inasmuch as the customer can buy one ticket from Mexico to Arizona without having to get off the bus at the border, buy a new ticket, wait for another bus to arrive, and then board a new bus to actually reach their international destination.

1 bus crash. Plaintiff argues that Autotransportes Tufesa and Tufesa USA are jointly liable for
2 her injuries.

3 **DISCUSSION**

4 Tufesa U.S.A. argues that Autotransportes Tufesa is the only named defendant that
5 actually could be legally at fault in this case; as Tufesa U.S.A. asserts that it is a totally
6 independent and separate corporation from Autotransportes Tufesa, Tufesa USA asserts that
7 it can not be held legally responsible for the separate tortuous acts of Autotransportes Tufesa.
8 Tufesa U.S.A. argues that Plaintiff only purchased a bus ticket from Autotransportes Tufesa
9 in Mexico, that Plaintiff boarded Autotransportes Tufesa's bus in Mexico, that the driver of
10 the bus in question was only a Mexican employee of Autotransportes Tufesa, and that the bus
11 crash and injuries to Plaintiff all occurred in Mexico while Plaintiff was an occupant in
12 Autotranportes Tufesa's bus. Accordingly, Tufesa U.S.A. argues that it can not be held
13 directly liable to Plaintiff for negligence as it owed no duty to her. Likewise, Tufesa U.S.A.
14 further argues that it can not be held liable for the acts of Autotransportes Tufesa based on
15 a piercing the corporate veil, instrumentality, alter-ego, or unity of interest type theory as
16 Tufesa U.S.A. and Autotransportes Tufesa are totally separate corporations that can not be
17 held liable for the actions of the other corporation. For example, in arguing that the two
18 corporations are totally independent of each other, Tufesa U.S.A. argues that: Tufesa U.S.A.
19 is not the parent corporation of Autotransportes Tufesa; that the two corporations do not have
20 any ownership interests in each other; the controlling shareholders of Autotransportes Tufesa
21 do not control Tufesa U.S.A.; Tufesa U.S.A. is an Arizona corporation that provides bus
22 services only in the United States while Autotransportes Tufesa is a Mexican corporation that
23 only provides bus services in Mexico; both corporations have separate business addresses
24 (Tufesa U.S.A. in Arizona and Autotransportes Tufesa in Mexico); both corporations observe
25 their own corporate formalities by holding separate meetings and keeping minutes; both
26 corporations maintain their own financial records, have separate banking accounts, pay their
27 own expenses and salaries, buy their own uniforms, and hire their own employees;
28 Autotransportes Tufesa has a distinct administrative board; both companies have separate

1 management; bus ticket revenues are allocated according to each company's provision of
2 services (i.e., Tufesa U.S.A.'s bus services in the United States and Autotransportes Tufesa's
3 bus services in Mexico).

4 A review of Plaintiff’s response to Tufesa U.S.A.’s motion for summary judgment shows
5 that the decisive issue before the Court is whether Tufesa U.S.A. and Autotransportes Tufesa
6 were engaged in a joint venture such that Tufesa U.S.A. can be held jointly liable for the
7 actions of Autotransportes Tufesa. Plaintiff’s response does not address Tufesa’s legal
8 arguments pertaining to Tufesa U.S.A.’s lack of duty to Plaintiff or the efficacy of holding
9 Tufesa U.S.A. liable for the acts of Autotransportes Tufesa based on a piercing of the
10 corporate veil, instrumentality, alter-ego, or unity of interest type theory. Rather, Plaintiff
11 only specifically argues that Tufesa U.S.A. and Autotransportes Tufesa were engaged in a
12 joint venture to provide direct² bus service from numerous locations in Mexico to the United
13 States and direct bus service from numerous locations in the United States to Mexico; as this
14 joint venture led to Plaintiff’s injuries, Plaintiff argues that Tufesa U.S.A. is jointly liable
15 with Autotransportes Tufesa. Accordingly, in light of Plaintiff’s response, the Court will
16 only address the joint venture issue as it pertains to Tufesa U.S.A.’s motion for summary
17 judgment.

Generally, there “must be some community of purpose to give rise to joint tort liability.” *Sparks v. Republic Nat’l Life Insurance Co.*, 132 Ariz. 529, 540 (1982). “Vicarious liability for concerted action may be found to exist when the tort-feasors have entered into a joint enterprise or joint venture . . . Where a joint venture exists, each of the parties is the agent of the others and each is likewise a principal so that the act of one is the act of all.” *Id.* “In such a relationship, it may be said that the partners or persons engaged in the common enterprise are subject to a common duty, the breach of which will subject those persons to liability for the entire harm resulting from the failure to perform the duty.” *Id.*

²⁷ Direct inasmuch as the customer can buy one ticket from Mexico to Arizona (or vice versa) without having to get off the bus at the border, buy a new ticket, wait for another bus to arrive, and then board a new bus to actually reach their international destination.

1 As a threshold matter, the Court notes that the parties disagree as to the essential elements
2 required to demonstrate a joint venture. Initially, both parties cite to *Tanner Companies*
3 which lists the classic elements of a joint venture as “(1) a contract; (2) a common purpose;
4 (3) a community of interest; (4) an equal right to control; and (5) participation in the profits
5 and losses.” *Tanner Companies v. Superior Court*, 144 Ariz. 141, 143 (1985). However,
6 Plaintiff subsequently cites *Farr* for the proposition that not all five elements of a joint
7 venture referenced in *Tanner Companies* must be shown to demonstrate joint venture liability
8 in Arizona; in *Farr*, a showing of an equal right to control and participation in profits and
9 losses was not required to show joint venture liability between an insurer and its claims
10 administrator. *See Farr v. Transamerica Occidental Life Ins. Co. of California*, 145 Ariz.
11 1, 11 (Ct. App. 1984)(“[The Arizona Supreme Court’s decision in] *Sparks* turns upon the
12 idea that the insurer and its agent are engaged in a joint venture so that each is jointly and
13 severally liable with the other for a bad faith refusal to pay. Occidental . . . says that not all
14 the features of a joint venture are present here. Looking to those features, we note that here
15 there was no proof of profit and loss sharing and no proof of a joint right to control. Thus,
16 the classical elements of a joint venture are missing. But if that is true here, it was also true
17 in *Sparks*. In *Sparks* the court found that a company that issued certificates of coverage,
18 billed and collected premiums, handled the investigation and payment of claims, and
19 distributed brochures to induce the purchase of policies was engaged in a joint venture with
20 the insurer . . .”).

21 Defendant argues, however, that all five elements listed in *Tanner Companies* must be
22 shown to demonstrate a joint venture in Arizona. Defendant argues that the elements of joint
23 control and sharing in profits and losses were not required in *Farr* and *Sparks* due to the
24 unique insurer-claims administrator type relationship which has important public policy
25 implications for insureds which are not at issue in this case. A review of *Sparks*, however,
26 does not show that the Court limited its analysis and holding pertaining to joint ventures to
27 the specific facts only in that case; rather, unlike *Tanner Companies*, *Sparks* simply listed
28 four (as opposed to five) requirements to show a joint venture: “A joint venture requires an

1 agreement, a common purpose, a community of interest, and an equal right to control.”
2 *Sparks*, 132 Ariz. at 540. After listing the requirements for a joint venture, the *Sparks* Court
3 concluded that there “can be no doubt that the business relationship entered into by [insurer
4 and its claims administrator] contained all of the essential elements of a joint venture, and
5 that any acts of [the insurer or its claims administrator] could be imputed to the other.” The
6 *Sparks* court never states that it waived the requirements of participation in profits and losses
7 or equal right to control because of the public policy implications involved with insurers and
8 their insureds in Arizona. *Id.* While equal right to control was listed as a requirement for a
9 joint venture in *Sparks*, the *Sparks* court never stated that participation in profits and losses
10 was a requirement for a joint venture and further found that a joint venture existed because
11 the “essential elements” of a joint venture were present even though there was no equal right
12 to control. *Id.*; *Farr*, 145 Ariz. at 11.

13 A review of the relevant Arizona case law pertaining to joint ventures shows that there are
14 numerous cases listing only four required elements to establish a joint venture and none of
15 them list participation in profits and losses as a requirement; rather, a review of these cases
16 reflects the following four requirements: (1) a contract or agreement, (2) a common purpose,
17 (3) a community of interest, and (4) an equal right of control. *See Sparks v. Republic Nat'l
Life Insurance Co.*, 132 Ariz. 529, 540 (1982)(“A joint venture requires an agreement, a
19 common purpose, a community of interest, and an equal right to control.”); *Murry v. Western
American Mortgage Co.*, 124 Ariz. 387, 390 (Ct. App. 1980)(“[T]he essential elements of
21 a joint venture [are] an agreement, common purpose, a community of interest, and an equal
22 right of control.”); *Jolly v. Kent Realty, Inc.*, 151 Ariz. 506, 513 n. 4 (Ct. App. 1986)(“A joint
23 venture requires an agreement, a common purpose, a community of interest, and an equal
24 right to control.”); *Nahom v. Blue Cross Blue Shield of Arizona*, 180 Ariz. 548, 558 (Ct. App.
25 1994)(“To show a joint venture, [plaintiff] must show an agreement, a common purpose, a
26 community of interest and an equal right of control.”); *Weller v. Hansen*, 21 Ariz. App. 217,
27 222 (Ct. App. 1973)(“The elements of a joint venture are (1) a contract, (2) a common
28 purpose, (3) a community of interest, and (4) and equal right of control.”); *Cothrun v.*

1 *Schwartz*, 156 Ariz. 459, 461 (Ct. App. 1988)(listing the required elements of a joint venture
2 as “(1) a contract, (2) a common purpose, (3) a community of interest, and (4) an equal right
3 of control.”); *West v. Soto*, 85 Ariz. 255, 261 (1959)(same); *Mercer v. Vinson*, 85 Ariz. 280,
4 286 (1959); *Garcia v. City of South Tucson*, 131 Ariz. 315, 318 (1981)(same). In light of the
5 numerous Arizona cases cited above, it is clear that a joint venture can be demonstrated
6 where there is a contract or agreement, a common purpose, a community of interest, and an
7 equal right of control. *See id.* As such, the Court will focus on these factors in determining
8 whether there is an issue of fact as to the existence of a joint venture in this case.

9 A review of Tufesa U.S.A.’s reply to Plaintiff’s response in opposition to summary
10 judgment reflects that Tufesa U.S.A. only specifically argues that a joint venture does not
11 exist because an equal right to control and participation in profits and losses has not been
12 demonstrated; Tufesa U.S.A.’s reply does not argue that a contract or agreement, a common
13 purpose, or a community of interest has not been demonstrated and a review of the facts
14 adduced by Plaintiff clearly shows an issue of fact as to these required elements. As
15 participation in profits and losses is not a requirement to show a joint venture in numerous
16 Arizona cases as discussed above, the Court finds that Defendant’s argument as to this issue
17 is without merit. Thus, the primary issue before the Court is whether there was an equal right
18 to control between Tufesa U.S.A. and Autotransportes Tufesa.

19 As reflected below, taking the facts advanced by Plaintiff as true and drawing all
20 reasonable inferences in her favor, there is an issue of fact as to all four requirements for a
21 joint venture such that summary judgment must be denied.

22 Plaintiff argues that contrary to Tufesa U.S.A.’s assertions, the evidence it has introduced
23 shows that Tufesa U.S.A. and Autotransportes Tufesa are not separate and independent
24 corporations, but are intimately intertwined entities that work closely together to provide (and
25 represent to consumers) convenient, direct bus service from Mexico to numerous locations
26 in Arizona and other Southwestern states and convenient, direct bus service from Arizona
27 and other Southwestern states to Mexico.

28

1 Since 1994, Autotransportes Tufesa has been offering bus transportation throughout
2 Mexico. Oscar Luna Fernandez (“Oscar”) is the founder of Autotransportes Tufesa, is its
3 largest shareholder, and Oscar and his children own a controlling interest in Autotransportes
4 Tufesa. According to Autotransportes Tufesa, it is only a Mexican corporation and therefore
5 does not have the ability to offer bus transportation in the United States. Nonetheless, as
6 stated on its website and as admitted by Autotransportes Tufesa’s Secretary and General
7 Manager, its “vision” has been to offer international bus transportation directly between
8 Mexico and the United States (i.e., from Mexico to Arizona and other Southwestern states,
9 and from Arizona and other Southwestern states to Mexico); Autotransportes Tufesa is in
10 the business of providing international bus transportation. Oscar’s son, Luis Alberto Luna
11 Medina (“Luis”), is the Secretary and General Manager for Autotransportes Tufesa. When
12 asked about his duties as General Manager for Autotransportes Tufesa, Luis stated in his
13 deposition: “Well, basically it would be managing and keeping control of our financial
14 situation, human resources, fleet maintenance, bus business profitability, information systems
15 control. And dealing, our relationship with all of our suppliers.” *See Luis Deposition at 10.*
16 Immediately thereafter, Luis was asked “You run the show?” and he responded “Something
17 like that, right.” *See id.*

18 Subsequently, Luis was tasked with the duty of running a newly founded American bus
19 transportation company which is Tufesa U.S.A which offers international bus transportation
20 originating in the United States and continuing through Mexico. Nine of the fifteen
21 shareholders of Autotransportes Tufesa are also shareholders of Tufesa U.S.A. Oscar, his
22 son Luis, and Oscar’s other children own approximately 40% of the shares in Tufesa U.S.A.
23 The shareholders, which includes Luis, receive dividends from their shares in Tufesa U.S.A.

24 The home office of Tufesa U.S.A. is based in Phoenix, Arizona and is incorporated in
25 Arizona; Tufesa USA has approximately 35 employees whose tasks include selling tickets,
26 cleaning buses and following the directives of management.

27 As with Autotransportes Tufesa, Luis is also the General Manager of Tufesa U.S.A.
28 While Autotransportes Tufesa actually pays Luis a salary for the work he performs for

1 Autotransportes Tufesa, Tufesa U.S.A. does not pay Luis any salary for the work he performs
2 as General Manager for Tufesa U.S.A. He carries out his duties for Tufesa U.S.A. both in
3 Autotransportes Tufesa's office in Obregon City, Sonora, Mexico, and also works out of
4 Tufesa U.S.A.'s office in Phoenix, Arizona three to four days every few weeks. As reflected
5 in his deposition, Luis is the General Manager for Tufesa U.S.A. and his duties include:
6 "Check in on day-to-day operations, day to day operations, management, and payment for
7 services. And seeking new markets, growth." *See* Luis Deposition at 7. According to Luis'
8 affidavit, he is the "sole manager" for Tufesa U.S.A. *See* Luis Affidavit at ¶28 ("I am
9 Tufesa's sole manager."). Luis is responsible for making policy decisions for Tufesa U.S.A.
10 which are then implemented by other employees of Tufesa U.S.A. *See* Affidavit of Arturo
11 Monje ("Part of my responsibilities . . . is implementation of the policy decisions made by .
12 . . Luis.").³ When asked during his deposition: "So doesn't make sense that you are really
13 an employee of Autotransportes Tufesa and you are paid by Autotransportes Tufesa to
14 manage Tufesa USA?", Luis responded: "Well it would make sense to think like that." *See*
15 Luis Deposition at 8-9.

16 To offer bus transportation services through Tufesa U.S.A., Luis decided to “lease” buses
17 for Tufesa U.S.A.’s bus routes in Arizona and other Southwestern states. Luis signed and
18 entered into a “lease” agreement with Luis simultaneously as leasee and leasor for Tufesa
19 U.S.A. and Autotransportes Tufesa. Luis, on behalf of and as General Manager for Tufesa
20 U.S.A., signed a master “lease” agreement as the “lessee” of buses effective November 14,
21 2004. Likewise, Luis, on behalf of and as Secretary/General Manager of Autotransportes
22 Tufesa again signed the “lease” agreement effective November 14, 2004 whereby

25 ³The Court notes that Luis' affidavit states that he is the "sole manager" for Tufesa U.S.A.,
26 his deposition reflects that he is the General Manager for Tufesa U.S.A. in charge of day-to-day
27 operations, and Monje's affidavit reflects that Luis sets policy for Tufesa U.S.A which Tufesa
28 U.S.A. employees (i.e., Monje) implement; nonetheless, Monje's affidavit (which was submitted
subsequent to Luis' affidavit and deposition with Tufesa's U.S.A.'s reply brief) curiously states that
Monje is the General Manager of Tufesa U.S.A. and that Monje manages its daily operations which
flatly contradicts Luis' earlier affidavit and deposition.

1 Autotransportes Tufesa was the “leasor” of buses to Tufesa U.S.A. Tufesa U.S.A. only
 2 “leases” buses from Autotransportes Tufesa. The same law firm and respective attorneys
 3 therefrom represented both Tufesa U.S.A. and Autotransportes Tufesa in regards to this
 4 “lease” agreement. The same law firm and respective attorneys therefrom continue to
 5 represent both Tufesa U.S.A. and Autotransportes Tufesa.

6 According to this “lease” agreement, lessee Tufesa U.S.A. does not actually take physical
 7 possession of buses for an extended and predetermined number of years, months or weeks
 8 and render a fixed payment for buses to leasor Autotransportes Tufesa. Rather, under this
 9 special “lease” agreement, Tufesa U.S.A. and Autotransportes Tufesa are constantly using
 10 the same buses during parallel time periods throughout the entire year. The crossing of the
 11 United States-Mexico border serves as the magic “being leased by Tufesa U.S.A. period of
 12 time” versus “the bus is owned and operated by Autotransportes Tufesa period time.”

13 The record demonstrates that the way it works in practice between Tufesa U.S.A. and
 14 Autotransportes, for example, is that a customer in Mexico could purchase a ticket from
 15 Autotransportes Tufesa for direct⁴ bus service from Guadalajara to Tucson; customers do not
 16 have to purchase a separate ticket for the U.S. portion of the trip. The customer boards the
 17 Autotransportes Tufesa bus in Guadalajara en route to Tucson. Immediately before the
 18 Autotransportes Tufesa bus crosses the United States border, a Tufesa U.S.A. bus driver gets
 19 on Autotransportes Tufesa’s bus, takes the drivers seat, and a Autotransportes Tufesa bus
 20 driver takes a seat as a passenger. Both the Tufesa U.S.A. bus driver and Autotransportes
 21 bus driver have the same uniforms and customers would not be able to tell that they work for
 22 supposedly different companies based on these identical uniforms unless the customer
 23 examined the driver’s identification badge. Luis purchases these identical uniforms for the
 24 bus drivers for both Tufesa U.S.A. and Autotransportes Tufesa. As the Tufesa U.S.A. driver
 25 inches the nose of Autotransportes Tufesa’s bus across the United States border (while the

26
 27 ⁴The bus trip is direct inasmuch as the customer can buy one ticket from Mexico to Arizona
 28 (or vice versa) without having to get off the bus at the border, buy a new ticket, wait for another bus
 to arrive, and then board a new bus to actually reach their international destination.

1 Autotransportes Tufesa driver now watches as a passenger), the bus suddenly⁵ becomes a bus
 2 that is “leased” by Tufesa U.S.A. and driven by a Tufesa U.S.A. employee. Despite the
 3 sudden “lease” to Tufesa U.S.A. that happens as the bus crosses the border, an
 4 Autotranportes Tufesa bus driver remains on the bus until the bus reaches its United States
 5 destination-Tucson; it appears that this Autotranportes Tufesa bus driver that remains as a
 6 passenger on Tufesa U.S.A.’s “leased” bus gets a free ride in the United States as he
 7 apparently does not buy a ticket from Tufesa U.S.A. for his time as a passenger in the United
 8 States portion of the bus trip. Likewise, if a customer was to buy a ticket from Tufesa U.S.A.
 9 for direct bus service from Tucson to Guadalajara, the same situation would occur. Shortly
 10 before the bus reaches the Mexico border, an Autotransportes Tufesa bus driver rises from
 11 the seated passenger position, takes the still-warm driver’s seat of Tufesa U.S.A.’s recently
 12 departed bus driver, and completes the bus journey to Guadalajara; the customer does not
 13 have to purchase a separate ticket for the portion of the trip in Mexico. As soon as the bus
 14 crosses the Mexico border the bus is no longer considered “leased” by Tufesa U.S.A. and is
 15 simply owned and operated by Autotransportes Tufesa once again while in Mexico. At the
 16 time of purchase from either company, it appears to the customer that it is a direct bus ride
 17 (from Mexico to the U.S. or from the U.S. to Mexico) to a specific destination by one
 18 company; it does not appear to the customer that a different bus company with a different bus
 19 driver will take over a portion of the trip.⁶

20

21 ⁵It is unclear whether the entire bus becomes “leased” by Tufesa USA as soon as the nose
 22 of the bus inches across the border, or only the physical portion of the bus that actually crosses the
 23 border becomes leased (i.e., the rear portion of the bus may remain “owned” by Autotransportes
 24 Tufesa at the same time the front portion of the bus that is inching across the border is “leased” by
 25 Tufesa USA). Thus, if there happens to be an accident right at border crossing where half of the bus
 26 is in Mexico and half of the bus is in the United States this could present a real dilemma as to who
 27 the respective companies would claim is responsible.

28

⁶Plaintiff points out that buses arriving from Mexico into the U.S. are fueled up by Tufesa
 U.S.A. at its expense and that the costs of fuel are later calculated and divided between fuel used by
 Tufesa U.S.A. in the U.S. and fuel used by Autotransportes Tufesa in Mexico; Luis along with two
 others from Autotransportes Tufesa play a role in determining how much Tufesa U.S.A. is paid for
 fuel. Plaintiff also argues that Autotransportes Tufesa essentially pays taxes in the U.S.; for

1 As stated above, under the “lease”⁷ agreement, Tufesa does not pay any set sum for the
 2 privilege of solely controlling the vehicles for any extended period of time; rather, the “rental
 3 amount” for Tufesa USA “leasing” Autotranportes Tufesa’s buses appears to be “10% of
 4 total gross sales” between locations in Arizona and other Southwestern States. *See Lease*
 5 *Agreement* (Exhibit A-7 to Agreement). Thus, if sales of bus tickets made by Tufesa USA
 6 increase, Autotransportes Tufesa receives more money; if sales by Tufesa USA decrease,
 7 Autotransportes Tufesa receives less money.

8 Autotransportes Tufesa and Tufesa USA share the exact same website. As reflected on
 9 their joint website, the companies are not listed as two distinct entities of “Autotransportes
 10 Tufesa” and “Tufesa USA” Rather, the website reflects one unified company. It reflects
 11 one company listed only as “Tufesa” in large, bold letters. The logo is identical for both
 12 companies, and it also states in large, bold letters that “Tufesa” is “The strongest line in
 13 northwestern Mexico and southern United [S]tates.” In describing the “Tufesa” company,
 14 the website constantly lists only “Tufesa’s” vision, services, bus routes, etc.; all of the
 15 advertising, text, and discussion on the website reflects one unified company of “Tufesa.”

16

17

example, tax form 1042-S for year 2007 shows that Tufesa USA sent \$123,000 to Autotransportes
 18 Tufesa, but withheld \$37,000 for taxes. The withheld money was deposited with the U.S. Treasury,
 19 but Autotransportes Tufesa filed no tax return such that it essentially waived its claim for a refund
 20 of \$37,000. Autotransportes did the same in 2006 whereby it essentially waived a refund of \$32,000
 21 stemming from funds Tufesa USA withheld from an approximately \$106,000 payment made to
 Autotransportes Tufesa.

21

7It is unclear from the record whether Luis on behalf of Tufesa USA evaluated whether the
 22 “lease” agreement with Autotransportes Tufesa was the best business move for Tufesa USA in his
 23 role as General Manager. For example, it is unclear whether Luis ever spoke with dealerships or
 manufacturers about purchasing (in bulk or otherwise) a fleet of buses for Tufesa USA’s exclusive
 24 use and whether this was a more economical and profitable option for Tufesa USA. It is also unclear
 whether Luis, on behalf of Tufesa USA, ever spoke with other companies (other than
 25 Autotransportes Tufesa) about lease terms for buses and used these quoted lease terms as a
 bargaining chip with Autotransportes Tufesa to obtain more favorable lease terms; as Luis ultimately
 26 signed as “leasee” for Tufesa USA and signed as “lesor” for Autotransportes Tufesa it is unclear
 how these negotiations would proceed. Likewise, it is unclear from the record whether Luis on
 27 behalf of Autotransportes Tufesa evaluated whether the “lease” agreement with Tufesa USA was
 28 the best business move for Autotransportes Tufesa in his role as General Manager.

1 See “Tufesa” Website (“Tufesa is a transport company that possesses modern buses, highly
2 qualified personnel, technology . . . and advanced computer . . . systems; making Tufesa the
3 leader . . . in autotransport . . .”; “. . . Tufesa . . . want[s] to become an enterprise group . . .
4 able to influence national[ly] and internationally”; “[At] Tufesa we have the commitment to
5 transmit the following values within our . . . organization . . .”; “[At] Tufesa we offer an
6 excellent Package and Delivery Service”; “Tufesa’s standard class, is available in all our
7 branches”; “Tufesa Direct service . . .”). When Luis was asked during his deposition about
8 the statement on the website regarding the vision to influence internationally, Luis stated that
9 the goal was to “provide our services beyond Mexico’s border’s,” and he admitted that goal
10 has been achieved as they offer bus services to Tucson, Phoenix, Las Vegas, and Los
11 Angeles. The website also states that bus service is also offered to numerous other
12 destinations in the United States including: “Hungtington Park . . . Ontario, Colton,
13 Bakersfield, Fresno, Merced, Modesto, Sacramento, Stockton.” It also appears that tickets
14 for the various destinations can be purchased from “Tufesa” on the joint website.

15 In light of the foregoing, a reasonable jury could find the essential elements of a joint
16 venture in this case: a contract or agreement, a common purpose, a community of interest,
17 and an equal right of control. As referenced earlier in this Order, Defendant specifically
18 disputes that an equal right of control is present in this case.⁸ In addressing the “equal right

20 ⁸As noted earlier, Tufesa USA also specifically disputed that participation in profits and
21 losses was present in this case. The Court has already found, based on numerous cases in Arizona,
22 that participation in profits and losses is not required to show a joint venture. However, even if it
23 was required, the facts discussed in this Order nonetheless reflect that a reasonable jury could find
24 this element was present in this case. A reasonable jury could find that profits and losses were
25 shared via the “lease” agreement whereby Autotransportes Tufesa was supposedly paid “rent” by
26 receiving 10% of Tufesa USA’s total gross sales for bus transportation in the U.S. A reasonable jury
27 could also find participation in profits and losses via Tufesa USA’s and Autotransportes Tufesa’s
28 closely intertwined relationship whereby they are represented to customers as a unified entity such
that they can offer direct bus transportation whereby a customer can buy one ticket taking him from
locations in Mexico all the way to locations in the U.S and from locations in the U.S. all the way to
Mexico without having to inconveniently stop, get off a bus, buy a new bus ticket at the border with
a separate transportation company, wait for a new bus to arrive, then board the bus. A reasonable
jury could find that the profits of Tufesa USA and Autotransportes Tufesa have jointly increased
due to this very valuable, added convenience for customers who might otherwise forgo such trips

1 to control element,” Arizona courts have recognized that “joint ownership of property is not
 2 necessary to establish an equal right of control” and that the “requisite of equality in joint
 3 control does not render impossible the delegation of the duties of management to one of the
 4 participants in a joint venture. The rights of the parties with respect to the management and
 5 control of the enterprise may be fixed by agreement so as to effectively place control in the
 6 hands of one of the joint venturers . . .” *See Ellingson v. Sloan*, 22 Ariz.App. 383, 386 and
 7 387 n. 1 (1974)(internal quotes and citations omitted); *see also Continental Casualty Co. v.*
 8 *Signal Insurance Co*, 119 Ariz. 234, 237 (Ct. App. 1978)(same). The Arizona Supreme
 9 Court has stated that “[w]hile the ‘equal right to control’ element of a joint venture could
 10 imply that each venturer must have an equivalent amount of control over the venture’s
 11 operation, we believe it is more accurate to say that each joint venturer must share, to some
 12 extent, in the control of the venture. In other words, it is sufficient that a venturer has some
 13 voice or right to be heard in the control and management of the venture.” *Estate of*

14 _____
 15 or choose an alternative vendor or other means of transportation between the U.S. and Mexico. The
 16 Court notes that there are courts that have recognized that the “mutual benefit” flowing from a joint
 17 venture can replace the classic requirement of sharing in profits. *See Transport Indemnity Co. v.*
Liberty Mutual Insurance Co., 620 F.2d 1368, 1370-71 (9th Cir. 1980). In addition, the Court notes
 18 that courts have found the sharing of profits (even though not required) in relation to a joint venture
 19 on facts much less indicative of a joint venture as compared to this case. For example, in *Mercer*
v. Vinson, Mr. Rima happened to own a trailer home park and Mr. Vinson happened to own a trailer
 20 home. *See* 85 Ariz. 280 , 283, 286-88 (1959). Vinson was away most of the year, so Vinson
 21 approached Rima (they did not know each other previously) about parking his trailer at his trailer
 22 park while he was away and renting out his vacant trailer to someone while it was parked in Rima’s
 23 trailer park. *Id.* Rima’s standard rate for parking trailers was \$18.36 a month and Vinson intended
 24 to pocket \$25 a month from any renter of his trailer home. *Id.* Vinson found a young couple that
 25 would rent his trailer home and charged them \$43.36 a month (\$25 for Vinson to pocket and \$18.36
 26 to cover Rima’s standard monthly fee). *Id.* Each month, Rima would collect \$43.36 from the couple,
 27 keep \$18.36 for monthly parking and send the remaining \$25 to Vinson as they previously agreed.
Id. Unfortunately, due to the improper installation of an unvented heater in the trailer home by the
 28 manufacturer, there was a gas leak that caused the death of the couple renting the trailer home. *Id.* The administrator of the estate sued both Vinson and Rima alleging a joint venture, and the Arizona Supreme Court found that a reasonable jury could find that Rima and Vinson were “two individuals associating themselves together and pooling their mutual resources for their mutual betterment, a profit. Both assumed the risk of no profit in the event the enterprise was unsuccessful. We do not think it impossible for reasonable men to come to an honest conclusion that the facts as here outlined establish a joint enterprise or adventure.” *Id.* at 288.

1 *Hernandez by Hernandez-Wheeler v. Flavio*, 187 Ariz. 506, 510 (1997). Based on all the
 2 evidence before the Court, as discussed throughout this Order, a reasonable jury could also
 3 find that there was an “equal right to control” under the circumstances of this case. For
 4 example, a reasonable jury could find that there was “equal control” between the joint
 5 venturers via Luis as he is in fact the “control” person controlling both corporations in his
 6 dual role as General Manager for both Tufesa USA and Autotransportes Tufesa. As
 7 referenced earlier in this Order, when asked about his duties as General Manager for
 8 Autotransportes Tufesa, Luis stated in his deposition: “Well, basically it would be managing
 9 and keeping control of our financial situation, human resources, fleet maintenance, bus
 10 business profitability, information systems control. And dealing, our relationship with all of
 11 our suppliers.” *See* Luis Deposition at 10. Immediately thereafter, Luis was asked “You run
 12 the show?” and he responded “Something like that, right.” *See id.* As reflected in his
 13 deposition, Luis’ duties as General Manager for Tufesa USA include: “Check in on day-to-
 14 day operations, day to day operations, management, and payment for services. And seeking
 15 new markets, growth.” *See* Luis Deposition at 7. According to Luis’ affidavit, he is the “sole
 16 manager” for Tufesa U.S.A. *See* Luis Affidavit at ¶28 (“I am Tufesa’s sole manager.”). In
 17 addition, Luis is responsible for making policy decisions for Tufesa U.S.A. which are then
 18 implemented by other employees of Tufesa U.S.A. *See* Affidavit of Arturo Monje (“Part of
 19 my responsibilities . . . is implementation of the policy decisions made by . . . Luis.”). A
 20 reasonable jury could find that Luis in fact “runs the show” simultaneously for both Tufesa
 21 USA and Autotransportes Tufesa. In light of the symbiotic relationship between
 22 Autotransportes Tufesa and Tufesa USA as borne out by all the evidence before the Court,
 23 and in light of the responsibilities and power Luis wields over both corporations
 24 simultaneously, a reasonable jury could find “equal control” and that a joint venture exists
 25 between Tufesa USA and Autotransportes Tufesa.

26 Accordingly, Tufesa USA’s motion for summary judgment is denied.
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 28

1 **AUTOTRANSPORTES TUFESA'S MOTION TO DISMISS**

2 Autotransportes Tufesa has filed a related motion to dismiss for lack of personal
3 jurisdiction arguing that it is a wholly separate corporation from Tufesa USA and as such it
4 has absolutely no contacts with Arizona such that personal jurisdiction in this forum is
5 prohibited. The issues pertaining to the motion to dismiss for lack of jurisdiction closely
6 overlap with the facts and issues already discussed in detail above; as such, outside of setting
7 forth the relevant legal standards to be applied, the Court's remaining discussion will be quite
8 brief.

9 Plaintiff has the burden of establishing personal jurisdiction. *See Flynt Distrib. Co., Inc.*
10 *v. Harvey*, 734 F.2d 1389, 1392 (9th Cir. 1984). Plaintiff need only make a *prima facie*
11 showing of personal jurisdiction for the motion to dismiss to be denied; Plaintiff's facts are
12 taken as true and all inferences are drawn in her favor. *See Mattel, Inc. v. Greiner and*
13 *Hausser GmbH*, 354 F.3d 857, 862 (9th Cir. 2003). Because Plaintiff is asserting that
14 Arizona has personal jurisdiction over Defendants, Arizona law governs. *See Brainerd v.*
15 *Governors of the University of Alberta*, 873 F.2d 1257, 1258 (9th Cir. 1989). Arizona's long
16 arm statute permits personal jurisdiction to the full extent allowable under the due process
17 clause of the U.S. Constitution. *See id.* Thus, the Court need only determine whether the
18 assertion of personal jurisdiction over Defendants is consistent with the requirements of due
19 process. *See id.* "For a court to exercise personal jurisdiction over a nonresident defendant,
20 that defendant must have at least minimum contacts with the relevant forum such that the
21 exercise of jurisdiction does not offend traditional notions of fair play and substantial justice
22 . . . There are two forms of personal jurisdiction that a forum state may exercise over a
23 nonresident defendant-general jurisdiction and specific jurisdiction." *Boschetto v. Hansing*,
24 539 F.3d 1011, 1016-17 (9th Cir. 2008)(internal quotes and citations omitted). "A defendant
25 whose contacts with a state are substantial or continuous and systematic can be haled into
26 court in that state in any action, even if the action is unrelated to those contacts . . . This is
27 known as general jurisdiction. The standard for establishing general jurisdiction . . . requires
28 that the defendant's contacts be of the sort that approximate physical presence . . . Factors

1 to be taken into consideration are whether the defendant makes sales, solicits or engages in
 2 business in the state, serves the state's markets, designates an agent for service of process,
 3 holds a license, or is incorporated there.” *Bancroft & Masters, Inc. v. Augusta Nat. Inc.*, 223
 4 F.3d 1082, 1086 (9th Cir. 2000)(internal quotes and citations omitted). Specific jurisdiction
 5 can be established if three requirements are satisfied: “(1) The non-resident defendant must
 6 purposefully direct his activities or consummate some transaction with the forum or resident
 7 thereof; or perform some act by which he purposefully avails himself of the privilege of
 8 conducting activities in the forum, thereby invoking the benefits and protections of its
 9 laws^[9]; (2) the claim must be one which arises out of or relates to the defendant's
 10 forum-related activities^[10]; and (3) the exercise of jurisdiction must comport with fair play
 11 and substantial justice, i.e. it must be reasonable.”^[11] *Menken v. Emm*, 503 F.3d 1050, 1057

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13 ⁹The Ninth Circuit has “typically treated purposeful availment somewhat differently in tort
 14 and contract cases. In tort cases, we typically inquire whether a defendant purposefully directs his
 15 activities at the forum state, applying an effects test that focuses on the forum in which the
 16 defendant's actions were felt, whether or not the actions themselves occurred within the forum . . .
 17 [Under the effects test] the defendant allegedly must have (1) committed an intentional act, (2)
 18 expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered
 19 in the forum state . . . In a specific jurisdiction inquiry, [the Ninth Circuit] consider[s] the extent of
 20 the defendant's contacts with the forum and the degree to which the plaintiff's suit is related to those
 21 contacts. A strong showing on one axis will permit a lesser showing on the other. A single forum
 22 state contact can support jurisdiction if the cause of action arises out of that particular purposeful
 23 contact of the defendant with the forum state.” *Id.* at 1057-58 (internal quotes and citations omitted).
 24 “Physical contact with the forum state is not a necessary condition, within the rubric of purposeful
 25 availment, the [Supreme] Court has allowed the exercise of jurisdiction over a defendant whose only
 26 contact with the forum state is the purposeful direction of a foreign act having effect in the forum
 27 state.” *Harris Rutsky & Co. Ins. Services, Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1130 (9th Cir.
 28 2003)(internal quotes and citations omitted).

29

30 ¹⁰In determining whether [plaintiff's] claims arise out of [defendant's] forum-related conduct,
 31 the Ninth Circuit follows the but for test . . . Hence, [plaintiff] must show that he would not have
 32 suffered an injury but for [defendant's] forum-related conduct. *Id.* at 1058 (internal quotes and
 33 citations omitted).

34

35 ¹¹The Ninth Circuit considers the following seven factors in determining whether the
 36 exercise of jurisdiction is reasonable: “(1) the extent of the defendants' purposeful interjection into
 37 the forum state's affairs; (2) the burden on the defendant of defending in the forum; (3) the extent
 38 of conflict with the sovereignty of the defendants' state; (4) the forum state's interest in adjudicating

1 (9th Cir. 2007)(internal quotes and citations omitted). “The plaintiff bears the burden of
 2 satisfying the first two prongs of the test. If the plaintiff fails to satisfy either of these prongs,
 3 personal jurisdiction is not established in the forum state . . . On the other hand, if the
 4 plaintiff succeeds in satisfying both of the first two prongs, the burden then shifts to the
 5 defendant to present a compelling case that the exercise of jurisdiction would not be
 6 reasonable.” *Id.* (internal quotes and citations omitted).

7 As referenced above, the Court’s remaining discussion pertaining to the motion to dismiss
 8 shall be brief as the Court has already ruled that Plaintiff has established a *prima facie* case
 9 pertaining to a joint venture between Autotranportes Tufesa and Tufesa USA (an Arizona
 10 corporation with 35 employees whose home office is in Arizona) whose symbiotic
 11 relationship allows them to work closely together to provide (and represent to consumers)
 12 convenient, direct bus service from Mexico to numerous locations in Arizona and other
 13 Southwestern states and convenient, direct bus service from Arizona and other Southwestern
 14 states to Mexico. As there is an abundance of persuasive authority holding that the contacts
 15 with the forum state of one co-joint venturer may be imputed to the other co-joint venturer
 16 for purposes of establishing personal jurisdiction in the forum, the Court is likewise imputing
 17 the contacts with Arizona between co-venturers Tufesa USA and Autotransportes Tufesa
 18 such that the Court finds that personal jurisdiction over Autotranportes Tufesa is appropriate
 19 under the totality of the circumstances in this case as discussed earlier in the Order. *See, e.g.,*
 20 *Hill v. Shell Oil Company*, 149 F.Supp.2d 416, 418 (N.D. Ill. 2001)(“The joint venture . . .
 21 provides that the minimum contacts of one co-venturer are attributable to other co-venturers

22 the dispute; (5) the most efficient judicial resolution of the controversy; (6) the importance of the
 23 forum to the plaintiff’s interest in convenient and effective relief; and (7) the existence of an
 24 alternative forum.” *Id.* at 1058 (internal quotes and citations omitted). “No one of the factors is
 25 dispositive in itself. Instead, we are to balance all seven.” *Harris Rutsky & Co. Ins. Services, Inc.*,
 26 328 F.3d at 1132. The Ninth Circuit has also noted that “modern advances in communications and
 27 transportation have significantly reduced the burden of litigating in another country” which has
 lessened the weight given to factors (2) and (5), and that “[states] maintain a strong interest in
 providing an effective means of redress for its residents [who are] tortiously injured”, *Id.* at 1133
 (internal quotes and citations omitted).

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1 such that personal jurisdiction over one means personal jurisdiction over all. Because there
2 was enough evidence to suggest that [defendants] Shell, Equilon and Motiva were engaged
3 in a joint venture . . . we concluded that Motiva could not be dismissed from this lawsuit
4 given the sufficient Illinois contacts of Shell and Equilon.”); *Bonney v. Roelle*, 117 F.3d
5 1413, 1997 WL 407831, *8 (4th Cir. 1997)(“Even when an action does not arise out of the
6 non-resident defendant’s contact with the forum state, the exercise of personal jurisdiction
7 is proper if the non-resident defendant has had continuous and systematic contact with the
8 forum state . . . This is known as general jurisdiction . . . Applying these principles with
9 respect to SAZ and SAZ Dialog [German corporations], we conclude the district court
10 possessed at least general jurisdiction over them. HVB had continuous and systematic contact
11 with Virginia by virtue of its being headquartered in Virginia during the last year of the joint
12 venture. Under our circuit precedent and common law principles governing joint ventures,
13 such contact is attributable to SAZ and SAZ Dialog by virtue of SAZ and SAZ Dialog being
14 joint venturers with HVB . . . Thus, regardless of whether this action actually arose out of
15 SAZ and SAZ Dialog’s contacts with Virginia, they had sufficient minimum contacts with
16 Virginia such that requiring them to defend their interests in Virginia does not “offend
17 ‘traditional notions of fair play and substantial justice . . . Accordingly, we hold the district
18 court properly concluded that the default judgment against SAZ and SAZ Dialog was not
19 void for lack of personal jurisdiction.”)(unpublished disposition); *ABB Daimler-Benz*
20 *Transportation (North America, Inc. v. National Railroad Passenger Corp.*, 14 F.Supp.2d
21 75, 87 (D.D.C. 1998)(“As joint venturers the action of one is attributed to the other. Thus,
22 the actions of Amtrak in D.C. are imputed to NJT, and as such, NJT is subject to personal
23 jurisdiction in this forum . . .”); *Bensmiller v. E.I. Dupont Nemours & Co.*, 47 F.3d 79, 81
24 (2nd Cir. 1995)(recognizing that the forum contacts of one co-venturer can be attributed to
25 the other co-venturer for the purpose of establishing personal jurisdiction); *Daynard v. Ness,*
26 *Motley, Loadhold, Richardson & Poole, P.A.*, 290 F.3d 42, 54, 57 (1st Cir. 2002)(“We
27 conclude that, similar to some cases involving actual partnerships, the relationship between
28 the defendants here invokes certain principles of the law of agency, partnership and joint

1 venture and that these principles permit imputing contacts . . . We think it consistent with the
2 Due Process Clause to attribute to the Scruggs defendants the Motley defendants' retention
3 of, and certain interactions with, [plaintiff] Daynard where, as Daynard alleges, they have
4 led Daynard and the public to believe they were joint venturers . . . Even if the [defendants]
5 were not joint venturers, they held themselves out to Daynard to be part of a joint venture .
6 . . and are subject, for personal jurisdiction purposes, to the doctrine of estoppel."); *Anderson*
7 *v. Dassault Aviation*, 361 F.3d 449 (8th Cir. 2004)(Michigan resident was injured in a plane
8 manufactured by a French corporation in Michigan and brought suit in Arkansas where a
9 subsidiary was located; although the court did not specifically find that the corporate veil
10 could be pierced via an alter ego relationship, the court imputed the contacts of the Arkansas
11 subsidiary to the French parent corporation such that the assertion of personal jurisdiction
12 was proper in Arkansas in light of the symbiotic relationship of the two companies);
13 *Administrators of the Tulane Educational Fund v. Debio Holding S.A.*, 2000 WL 877015, *3
14 (E.D. La. 2000)(“It has routinely been held that whenever one co-venturer acts in the forum
15 to further the interests of the venture, its contacts with the forum are attributed to the co-
16 venturers . . . Thus, when the activities of one co-venturer in the forum are sufficient to
17 sustain the exercise of personal jurisdiction, jurisdiction will attach as to all participants in
18 the venture.”); *Glenwood Farms Inc. v. Ivey*, 335 F.Supp.2d 133, 141 (D. Me. 2004)(“[T]he
19 contacts of either [joint venturer] in furtherance of the joint venture may be imputed to the
20 other members of the joint venture for purposes of determining related contacts with the
21 forum).

22 In light of the foregoing, Autotransportes Tufesa’s motion to dismiss for lack of personal
23 jurisdiction is denied.

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CONCLUSION

Accordingly, IT IS HEREBY ORDERED as follows:

(1) Tufesa USA's motion for summary judgment is denied and Autotransportes Tufesa's motion to dismiss for lack of personal jurisdiction is denied.¹²

DATED this 11th day of February, 2009.

Frank R. Zapata
FRANK R. ZAPATA
United States District Judge

¹²The Court notes that Plaintiff previously filed a Rule 56(f) motion to allow relevant discovery prior to ruling on the motion for summary judgment and motion to dismiss such that Plaintiff could have a fair opportunity to oppose the motions. Subsequent to filing this motion, the parties stipulated that discovery pertaining to these motions was proper and Plaintiff engaged in relevant discovery. As such, the Rule 56(f) motion is moot and shall be denied as moot.